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NO. 84-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SPIROS KOUTSOUBOS, Administrator of the Estate of JAMES KOUTSOUBOS,
Petitioner,

v.

BOEING VERTOL, DIVISION OF THE BOEING COMPANY, AND THE BOEING COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Boeing Vertol, a division of The Boeing Company, and The Boeing Company (jointly "Boeing Vertol" herein) respectfully submit that the Petition for Writ of Certiorari should be denied.

LIST OF PARTIES

All parties to the proceeding in the United States Court of Appeals for the Third Circuit are listed in the caption.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is incomplete. It ignores virtually all of the factual findings made by the trial court on Boeing Vertol's motion for summary judgment and following the trial on the third element of the government contract defense, a trial at which Petitioner presented no witnesses and offered no exhibits. The trial court's extensive and unchallenged factual findings are contained in the trial court's summary judgment opinion dated December 22, 1982 and bench opinion dated February 15, 1984 which are attached as Appendix A and Appendix B to the Petition, respectively. Respondents adopt and incorporate by reference those findings.

Petitioner contended below that the Boeing Vertol HH-46 helicopter in which Petitioner's decedent died was defectively designed due to lack of certain equipment which would have lessened the risk of drowning during unplanned water entries at night. Under the applicable Navy design specifications, however, none of that equipment could be installed on the accident helicopter. Applying the government contract defense to the case, the district court found "beyond a peradventure of a doubt" that the United States Navy approved every detailed specification for the accident helicopter, the helicopter met all the applicable specifications, and "by the overwhelming preponderance of the evidence" the Navy knew at least as much as, and in most cases considerably more than, Boeing about the relevant hazards in the use of the helicopter, including the hazards associated with unplanned water entries at night. Appendix B to Petition at 14A and 22A-24A.

The sole issue Petitioner presented to the Third Circuit was whether the government contract defense is applicable absent a showing that the government compelled compliance with detailed specifications or that the government had final control over the specifications. In light of the unchallenged trial court findings of "[a] continuous back-and-forth" between Boeing and the Navy, "with the Navy always, expectedly and properly, having the responsibility for and exercising responsibility for making final decisions as to specifications" (Appendix B to Petition, at 14A), the Third Circuit affirmed the judgment in favor of Boeing Vertol.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because

I.

PETITIONER'S FACTUAL ARGUMENTS WERE NEVER RAISED BEFORE THE THIRD CIRCUIT AND HE FAILED TO OFFER ANY EVIDENCE ON THEM EITHER AT THE SUMMARY JUDGMENT HEARING OR DURING THE TRIAL.

II.

PETITIONER'S SECOND QUESTION PRESENTED FOR REVIEW WAS NEVER RAISED BEFORE THE THIRD CIRCUIT.

III.

PETITIONER HAS FAILED TO DEMONSTRATE ANY SPECIAL AND IMPORTANT REASON FOR GRANTING REVIEW ON WRIT OF CERTIORARI ON HIS ONLY LEGAL ARGUMENT, AS REQUIRED BY THE SUPREME COURT RULES, RULE 17.1.

ARGUMENT

I.

PETITIONER'S FACTUAL ARGUMENTS WERE NEVER RAISED BEFORE THE THIRD CIRCUIT AND HE FAILED TO OFFER ANY EVIDENCE ON THEM EITHER AT THE SUMMARY JUDGMENT HEARING OR DURING THE TRIAL.

Petitioner's legal arguments on the government contract defense are based upon his generalized factual representations about the government weapons procurement process and the working relationship between the United States military and its suppliers. *See* Petition at 4-12. These factual representations are general and abstract in nature, reflecting only Petitioner's personal views on these subjects.[1] Those personal views are nowhere supported in the record since Petitioner did not submit any affidavit in opposition to Boeing Vertol's motion for summary judgment and did not present a single witness or offer any exhibit at trial.

Before the Third Circuit, Petitioner did not challenge any of the trial court's factual findings which, rather than being general and abstract, described in considerable detail the actual relationship between the United States Navy and Boeing Vertol with respect to the design of the particular HH-46 helicopter involved in this litigation. It is those unchallenged factual findings which Petitioner is required to use to support the legal

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[1] As just one example of Petitioner's unsupported "factual" representations, Petitioner claims the Third Circuit's reasoning ignores "the fact that there are more than a few contractors eager to do business with the government." *See* Petition at 6. There is no evidence in the record that any other contractor besides Boeing Vertol ever expressed any interest (much less eagerness) to build HH-46 helicopters for the Navy. Even if other contractors had been willing, there is no reason to believe (and no record evidence suggesting) that the Navy would allow those contractors to incorporate the very design features which the Navy did not authorize Boeing Vertol to incorporate on the HH-46. Accordingly, what Petitioner has represented to this Court as a "fact" is pure speculation, wholly unsupported in the record.

argument contained in his Petition. Since Petitioner has chosen to base his legal argument on hypothetical and incorrect "facts" rather than the evidence in the record, his legal argument is simply irrelevant.

II.

PETITIONER'S SECOND QUESTION PRESENTED FOR REVIEW WAS NEVER RAISED BEFORE THE THIRD CIRCUIT NOR JUSTIFIED BY THE EVIDENCE.

Petitioner's second question presented for review is whether the government contract defense applies in instances where there are design defects which were known or should have been known by the manufacturer but which were not known by the government at the time the design was approved. Petition at i. Petitioner did not make that argument before the Third Circuit and thus is not entitled to make such a claim before this Court.

Even if Petitioner had made this novel legal argument to the Third Circuit, it is clear that it would have failed. Petitioner offered no evidence at trial that Boeing Vertol should have known something about the allegedly defective design that was not known to the government. The district court found "by the overwhelming preponderance of the evidence that the Navy knew at least as much as, and in most instances considerably more than Boeing did about the relevant problems." Appendix B to Petition at 24A. This trial record discloses that it would have been impossible for the Navy not to know something which Boeing Vertol should have known since the information Boeing Vertol had was acquired "almost in its entirety" from the Navy. Appendix B to Petition at 21A. The district court further found that as between Boeing Vertol and the Navy, it was the Navy that failed to disclose all that it knew to Boeing. Appendix B to Petition at 22A. Petitioner's argument to the contrary ignores the uniform evidence and the district court's findings on this very point.

III.

PETITIONER HAS FAILED TO DEMONSTRATE ANY SPECIAL AND IMPORTANT REASON FOR GRANTING REVIEW ON WRIT OF CERTIORARI ON HIS ONLY LEGAL ARGUMENT, AS REQUIRED BY THE SUPREME COURT RULES, RULE 17.1.

Petitioner criticizes the government contract defense in several respects.[2] However, the only issue which Petitioner is entitled to present in his Petition is the single issue raised before the Third Circuit. *Ellis v. Dixon*, 349 U.S. 458 (1955). That issue is whether the government contract defense is applicable absent a showing that the Navy compelled[3] Boeing Vertol to accept the detailed specifications for the HH-46.

With respect to the sole legal issue properly in the Petition, Petitioner has not demonstrated any special and important reason for granting review on writ of certiorari as is required by Supreme Court Rule 17.1. Although Petitioner claims there is a conflict among the circuit courts on the issue, such is clearly not the case. Petitioner cites the Ninth Circuit's opinion in *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961) for the proposition that "compulsion must exist before the 'government contract defense' is available." (Em-

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[2] Petitioner criticizes, for example, the applicability of the government contract defense to product liability actions and claims a conflict exists among the circuit courts on this issue. *See* Petition at 7. Petitioner fails to identify such a conflict, however, and Boeing Vertol denies there is one. But even if there was a conflict on this issue, Petitioner is barred from raising it before this Court because it was never raised before the Third Circuit.

[3] Petitioner's interpretation of the term "compulsion" has never been articulated in the course of this litigation. If by "compulsion" Petitioner means that the government contract defense should be applicable only when the manufacturer is "compelled" to comply with the Navy's specifications, the district court's findings demonstrate that Boeing Vertol was certainly under "compulsion." Petitioner has never claimed that Boeing Vertol was at liberty to deviate in any fashion from the Navy's specifications.

phasis omitted.) (Petition at 7).[4] Petitioner fails to mention, however, that the Ninth Circuit subsequently limited the *Merritt, Chapman* holding to instances where the contractor is given complete discretion over the design, materials, and methods of construction:

> Notwithstanding its insistence that "compulsion" is an essential element of the government contractor defense, *Merritt, Chapman* is distinguishable. It held that a subcontractor who built a faulty cofferdam in a dam project can be held liable for damage caused by the collapse of the cofferdam. The government contractor claim was rejected because the contract with the United States left the design, materials, and method of construction entirely to the discretion of the subcontractor. The United States merely set the height requirement for the cofferdam. [Cite omitted.]
>
> Under these circumstances, *Merritt, Chapman* properly precludes the government contractor rule. When only minimal or very general requirements are set for the contractor by the United States the rule is inapplicable. ***The situation is different where the United States reviewed and approved a detailed set of specifications.*** This is precisely what may have happened in the present cases.

McKay v. Rockwell International Corp., 704 F.2d 444, 450 (9th Cir. 1983), *cert. denied*, 104. S. Ct. 711 (1984) (emphasis supplied). Both the Third and Seventh Circuits have also expressly rejected compulsion as an element of the government contract defense when the government has approved a reasonably precise set of specifications. *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246, 254 (3d Cir. 1982); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 597 (7th Cir. 1985). No circuit court has ever held to the contrary.

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[4] Petitioner also cites *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961) for the same proposition. That case, however, does not even discuss compulsion. Nor does that case involve the government contract defense. The issue in *Brown* was whether certain independent conduct on the part of the Air Force constituted intervening negligence which would supersede Boeing's negligence under California law. *Id.* at 317.

In the present case the unchallenged factual findings show that "the Navy established the specifications crucial to plaintiff's allegations of defective design [and] [i]nspection by the Navy revealed that these specifications had been satisfied." *Koutsoubos v. Boeing Vertol,* 553 F. Supp. 340, 344 (E.D. Pa. 1982) (Appendix A to Petition at 7A) (footnotes omitted). Under the uniform approach articulated by the Third, Seventh and Ninth Circuits, Boeing Vertol is thus protected by the government contract defense.

Petitioner's only other attempt to demonstrate special and important reasons for granting review in this case is his claim that the Third Circuit's opinion is in conflict with "the implications of *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977)." Petition at 10. Petitioner does not specify which "implications" of *Stencel Aero* are inconsistent with the Third Circuit's opinion in this case. Boeing Vertol can perceive none. *Stencel Aero* involved a government contractor's indemnity claim against the United States. The government contract defense was never raised by the government contractor in the underlying products liability action and this Court did not address the elements of the defense. Compulsion is never mentioned in the *Stencel Aero* opinion. Accordingly, the claimed inconsistency with "implications" of *Stencel Aero* certainly cannot rise to the level of special and important reasons for review.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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